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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 447

WEST TOWNS BUS COMPANY, a corporation of Illinois,

Appellant,

vs.

MARGARET B. LAU,

Appellee.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEE TO DISMISS OR AFFIRM.

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ARGUMENT.*

Appellee overlooks that the National Bankruptcy Act expressly enacts (USC Tit. 11, Sec. 626) that the property dealt with by the plan when transferred by the trustee to the reorganized debtor "shall be free and clear of all claims and interests of the debtor, creditors and stockholders" except as otherwise provided in the plan or the

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* In Statement of the Case, appellee states (pp. 3-4) that appellant "sought to file a so-called counterclaim" which appellee purports to quote. The trial court denied leave to file this paper (add. abs. 1, rec. 58) and the paper never became part of the record. Appellee offers no suggestion as to how or why the paper would be competent or relevant on any issue here.

order of confirmation or transfer, and that therefore the burden here was on appellee to show that appellee came within the named statutory exceptions, which burden appellee has not met. Appellee's basic error is the assumption that the question of the liability of appellant is solely a matter of state law, unaffected by the National Bankruptcy Act. Under the U. S. Constitution, the National Bankruptcy Act is the supreme law of the land and if there is a conflict between the Bankruptcy Act and the state law, the former must prevail.

Appellee's Motion is entitled "to dismiss or affirm," but since the Motion seemingly does not question the substantial character of appellant's federal grounds, nor that they were adequately presented below, the motion in substance is to affirm.

1. *The holding of the state court that after a reorganization plan has been approved and consummation order entered on the basis of the existing claims against the trustee, including a state court suit with a named ad damnum, nevertheless, under the provisions of the state practice act, the state court has power thereafter to allow the ad damnum to be increased, would make such provision of the state practice act invalid because repugnant to the National Bankruptcy Act.*

(Juris. Stat. 1, pp. 11-16; Mo. Appellee 1, pp. 5-8)

Appellee (p. 5) argues that there is no specific provision in the Bankruptcy Act requiring the disclosure of the maximal liability claimed by appellee. Such requirement is implied and is plainly inferable from other provisions of the Act; cf. Sec. 567 (the duty of the trustee to submit a statement of the property, liabilities and financial condition of the debtor), Sec. 569 (the duty of the

trustee to prepare a plan or a report why a plan cannot be effected), Sec. 616 (the plan of reorganization "(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge; . . . (6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them"), Sec. 621 "The judge shall confirm a plan if satisfied that . . . (2) the plan is fair and equitable, and feasible; . . ." As argued in appellant's Jurisdictional Statement, in order for an informed judgment to be made by the security holders in accepting the plan and by the court in confirming it, there must be full disclosure as to what is the maximal amount of the existing claims particularly if the reorganized corporation is to have any liability therefor. Appellee (p 5) argues that there is no provision requiring a person injured by the trustee's servants during the operation, "to make complete disclosure of the ultimate maximum liability of the trustee under penalty of having the injured person's claim reduced in amount." Appellee avoids the issue; appellant is not asking to have appellee's claim reduced in amount from what it was *at the time* the plan was accepted and confirmed, but is seeking to prevent appellee from increasing the amount *after* such acceptance and confirmation. Appellee says (p 5): "No showing has been made that the appellant considered appellee's claim in determining whether it would take over the system." The answer is obvious; if, as appellee contends, the plan makes appellant liable for the claim, the amount of the claim (and of any other claims) would be a factor that the security holders and the district court and the reorganized debtor would have to consider before the plan was accepted, confirmed and consummated. The security

holders and the court might well agree that the debtor could be reorganized and assume claims totalling *X* dollars but be unwilling to agree to such reorganization if the claims to be assumed would total *5X* dollars. Appellee (pp 5-6) states that the amendment, increasing the ad damnum "was permitted in accordance with the long standing rule in Illinois." Assuming, arguendo, that this is correct, the argument does not meet appellant's point that in an action against a bankruptcy reorganized debtor the right to make such an increase is to be governed by the provisions of the National Bankruptcy Act.

In Juris. Stat. (p. 12) appellant argued that the claim of appellee, a non-employee, against the trustee for the latter's alleged negligence was not a reorganization operating expense and had no priority therein. Appellee (pp. 6-7) takes issue. *In re New York, N. H. & H. Ry. Co.*, 2 Cir. 1937, 92 F. 2d 428, cited by appellant, was a holding that such a claim had no priority either under Tit. 11, 205(b) or 205(n), the court pointing out that 205(n) gives preference to "claims for personal injuries to employees" but does not extend the protection to others, non-employees. The court said there:

> "It would in any case be utterly fantastic to suppose that any passenger would be deterred from travelling on a road because a judgment for any injuries he might suffer would not be a prior claim. Yet only on some such theory can it be supposed that the case falls within subdivision (b). Perhaps subdivision (n) should have extended the protection, but it did not. McCullough v. Union Traction Co., 206 Ind. 585, 186 N.E. 300, does indeed go the whole way, but it stands alone against the uniform federal authorities."

It is true that the reorganization in the instant case was not under section 205 (the Railroad Corporation Act) but was under Chapter X, Section 501 *et seq.* Appellant submits however that the fact that Congress made the limited extension of preference protection in 205(n) to employees of railroads but not to passengers, and made no extension of preference whatever in Chapter X, is an indication of legislative intent that such claims shall not be preferred.

Appellee (p. 7) states that it is "well settled that damages for injuries to persons or property during a receivership . . . are classed as part of the operating expenses and are entitled to the preference accorded such claims." Appellee cites 3 cases: McCullough v. Union Traction Company, 186 N.E. 300, 200 Ind. 585; Beale v. Moore, 32 S.E. 2d 696, 183 Va. 519 and Bartlett v. Cicero L. H. and P. Co., 177 Ill. 68, 52 N.E. 339. *McCullough* and *Bartlett* involved injured employees, *Beale* involved a claim for attorney's fees; in none of the cases was there any question of the application of the National Bankruptcy Act. Further *McCullough* was cited In re New York, etc., 92 F. 2d 428 above as standing "alone against the uniform federal authorities." In *Bartlett* the state court recognized that the general rule was that a corporation would not be liable for the negligence or torts of the receivership employees except when it was alleged and proved that the receiver had applied his receipts to the improvement and betterment of the corporation's property, in which case the corporation would be liable for the receiver's negligence *pro tanto* to the amount received from him. The state court in *Bartlett* held that because of the allegation in plaintiff's declaration that such improvement had resulted, that the declaration stated a cause of action and that defendant should answer same, the court saying, 177 Ill. 68, 73:

(p. 73): "The main question, presented by the demurrer to the amended declaration in the present case, is this: Where a corporation has been placed in the hands of a receiver, and an injury or death has been caused by the negligence of the receiver while he is operating the property of the corporation; and where, by stipulation between the parties, the receiver is discharged, and the property is restored to the possession of the corporation, can the corporation itself be held liable for damages for the injury so received during the receivership? *As a general rule, a corporation,* while its property is in the hands of a receiver, has no control over either the receiver or his servants, and, therefore, *in the absence of any liability imposed by statute, is not responsible for the negligence or torts of the employes of the receiver; and no suit for damages occasioned thereby can be maintained against the corporation itself.* But there is an exception to this rule which will be hereafter stated.

"The amended declaration in this case contains the following averment: 'And the plaintiff avers further, that during the receivership the said receiver had the entire management and control of the business of the defendant company, collected large sums due it, sold its bonds and other property, and applied the receipts to the running of the business of the company *and to the improvement and betterment of the company's property,* and that the said property at the close of the receivership was without reservation turned back into the possession of the company.'" (emphasis supplied)

The court concluded that demurrer to the declaration should not have been sustained,

(p. 78) "If the corporation desires to set up that it is only liable for claims of this character to the amount of the net income during the receivership which has been applied to the improvement and bet-

terment of the property, the fact of the payment of such claims to an amount equal to the value of the improvements, if such fact exists, presents a question which the corporation must raise by the pleadings. (20 Am. & Ency. of Law, p. 390, and cases cited in note 1.)"

To sum up: Appellant, under Tit. 11, sec. 626, took the bus property here free and clear of all claims, except as therein provided and appellee has not shown that appellee's claim falls within any statutory exception. Further even if the National Bankruptcy Act could be disregarded, appellant would have no liability here, absent any allegations or showing that net income, if any, from the trustee's operation had gone into the improvement or betterment of the bus property.

2. *The holding of the state court that notwithstanding the provision of the consummation order that appellant's obligation to pay claims shall be subject to all applicable statutes of limitation, nevertheless, the state limitation statute should not be applied because of a later adopted amendment to the state practice act—would make such amendment invalid as repugnant to the National Bankruptcy Act.*

Juris. Stat. pp. 16-18 Mo. Appellee, pp. 8-9.

Neither in the state court opinion nor in appellee's Motion here, is there any reference to the specific language of the Consummation Order (par. 7, abs. 84) that the obligation of the reorganized debtor shall "be subject to any and all applicable statutes of limitation" and that, therefore, the action against appellant, begun over two years after the consummation order, was barred. Appellee (p. 8) states that "appellant took over the estate of the debtor burdened with the claims for operating expenses of which plaintiff's claim was one." This

statement has no support in the record. Appellant took over the estate of the debtor free and clear of all rights, claims of creditors, except "(d) All claims and obligations falling within the classes of claims which the Trustee has been authorized to incur or pay in the operation of the properties of the debtor or otherwise by any order or orders of the court." (par. 7, abs. 84). Appellant repeats that the record contains nothing bringing appellee's claim within this class, *because there is no showing that the trustee was ever authorized by any order of the bankruptcy court to incur or pay negligence claims by non-passengers.*

Appellee (p. 8) argues that since at the date of the consummation order, July 1, 1954, two years had already run from the accident date, May 13, 1952, the two year statute could not have been applicable to the reorganized debtor's liability. Appellee overlooks that in any cause of action, the statute commences to run only from the time the cause of action accrues and suit could have been brought; (54 C.J.S. Limitation of Actions, § 109 When right accrues, §110—Right Dependent on Future Event). Any cause of action against appellant accrued and suit thereon could have been brought on July 1, 1954 and the two-year statute commenced to run on that date. The consummation order, par. 7, abs. 84, expressly provided that debtor's obligation shall in each case be subject to the applicable statute of limitation so that appellant's obligation was subject to an action being brought against it within two years from July 1, 1954. Appellee is significantly silent about this provision of the order. Since appellee did not sue appellant within the two years from July 1, 1954, any obligation of appellant was thereby barred by the bankruptcy order.

Appellee cites Ill. Rev. St. Ch. 131, sec. 1.11, (which relates to computation of time) and Roth v. Lundin, 237 Ill. App. 456 (1925) (that an action brought in June 19, 1923 on accident occurring June 19, 1921 was timely); the relevancy of these citations does not appear. Appellee (p. 8) asks: "is it to be assumed that the bankruptcy court would have permitted appellant to take over the debtor estate, had it known that appellant would thereafter repudiate its obligations thus assumed?" Appellant has not repudiated any obligation, but is insisting that any obligation is, under the National Bankruptcy Act, limited by the terms of the Consummation Order, and that whatever obligation that order imposed was on the basis of the claimed *ad damnum* of $35,000 and on condition that action be brought against appellant within the statutory two year limitation period from the date of the transfer of the bus property by the trustee to appellant. Appellants asks in turn: is it to be assumed that the bankruptcy court would have refrained from enforcing in the reorganization proceeding a speedy liquidation of appellee's claim if the court knew that appellee proposed thereafter in the state court to increase the *ad damnum* by 400% and to wait over two years before asserting any liability against appellant?

3. *The holding of the state court that the transfer of the mortgaged bus line assets by the reorganization trustee to the reorganized debtor, appellant here, ipso facto made appellant liable for negligence claims of non-employees against the trustee, is repugnant to the National Bankruptcy Act and the rights, titles, privileges and immunities thereunder.*

Juris. Stat. pp. 18-20; Mo. Appellee 9-10.

Appellee argues that appellee's claim is an operating expense as disclosed in appellee's authorities. Appellant

hereinabove has shown that the authorities cited by appellee were inapplicable because they were state court receiver cases and not involving the National Bankruptcy Act; also that in one of them, *Bartlett,* the court expressly stated that even under state law, the liability of the corporation would be limited *pro tanto* to the amount shown to have been applied out of the receiver's collections for the betterment and improvement of the corporation property. Appellee (p. 9) argues that the liability in this case "was essentially against the fund in the hands of the trustee, and not against the custodian," citing *Bartlett.* Appellee overlooks that in such case, the liability is limited to the amount, if any, by which the property has been improved or bettered during the receivership and that there is no showing here to that effect; that the inferences in the present case are all against any such improvement or betterment, as will appear from the fact that the first mortgage bond holders have under the plan taken a scaling down of the principal of their bonds to 65% of the face value and in addition been forced to accept a non-cumulative income bond.

Conclusion.

Appellant earnestly urges that the judgment of the state supreme court has construed and applied state statutes in a way that is repugnant to the National Bankruptcy Act and the U.S. Constitution; that this court should note jurisdiction of the appeal and reverse the judgment below.

Respectfully submitted,

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